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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 1049

DWIGHT D. KINNE, CHARLES H. KINNE, and LELIA M. KINNE,
Petitioners,

vs.

STARR KING SCHOOL FOR THE MINISTRY (a corporation),
Respondent.

RESPONDENT'S REPLY TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Respondent hereby files its reply to the petition for a writ of certiorari recently filed herein, and shows as follows:

QUESTIONS PRESENTED.

The statement of questions presented by petitioners is not a full and accurate statement of the questions involved, and respondent therefore re-states the questions as follows:

1. Where a conditional sales contract for the sale of farm land in California calls for installment payments and makes time of the essence, and where the purchaser has been in default for over eight years on a contract calling for the payment of $3000 together with interest and taxes, on account of which only the sum of $325 has been paid in the last eight years, and where two notices of default and demand for compliance with the terms of the sale within a reasonable time were served without the buyer making any payments in response thereto, has the Circuit Court of Appeals erred in reversing the order of the District Court confirming the order of the Conciliation Commissioner which excused the defaulting purchaser?

2. Have the petitioners shown any ground of importance for this Court granting the writ of certiorari?

STATEMENT OF CASE.

The law and the facts in this case are very simple and, in spite of the strenuous complaints of petitioners that the full record of the case is not before this Court, we submit that the facts in the transcript of record now before this Court, give all the information neces-

sary to justify this Court in denying the petition for a writ of certiorari.

There is a full summary of the facts in the transcript of record, in the document entitled "Order Denying Petition to Strike Debtors Real Property from the Schedule" made by the Conciliation Commissioner, found on pages 17 to 30 of the transcript. The petitioners nowhere question the accuracy of any of the facts stated in this order, and the facts stated in the opinion of the Circuit Court of Appeals are based on the facts found in said order denying petition.

The only decisions necessary to consider in sustaining the order of the Circuit Court of Appeals, are the leading case of *Federal Farm Mortgage Co. v. Davis,* 132 F. (2d) 663, relied on chiefly by the Circuit Court of Appeals, and the recent California cases re-stating the correct rule as to the forfeiture of conditional sales contracts in California, of *Sawyer v. Sterling Realty Co.,* 41 Cal. App. (2d) 715, and *Kelso v. Ulrich,* 67 Adv. Cal. App. Reports 800, 155 Pac. (2d) 407 (decided on January 26, 1945), which rule was originally laid down in the leading case of *Glock v. Howard,* 123 Cal. 1.

Petitioners claim that the case of *Boone v. Templeman,* 158 Cal. 290, requires that the Court give them equitable relief. We fully subscribe to the doctrine found in the *Boone* case, but call this Court's attention to the fact that petitioners have overlooked the very important fact in that case that Boone, the land purchaser, before asking reinstatement of his contract

after his default in payment *"offered to pay in full"*, which fact is stated on page 22 of petitioners' brief in support of the petition for writ of certiorari. (Italics ours.) In the present case no such offer was ever made.

The case of *Kelso v. Ulrich, supra*, summarizes the California law on the subject of conditional sales contracts where time is made of the essence, and refers to the recent case of *Sawyer v. Sterling Realty Co.*, 41 Cal. App. (2d) 715, at 724. In the *Kelso* case, a certain alleged equitable defense was raised against the vendor, similar to the defense urged by petitioners before the Conciliation Commissioner. In the *Kelso* case, as well as in the *Sawyer* case, the Courts made it clear that where time is made of the essence, nothing less than tender of the full amount due would excuse the purchaser's default after notice of default and demand for performance was served upon the purchaser.

NO SPECIAL OR IMPORTANT REASON FOR GRANTING THE WRIT OF CERTIORARI APPEARS IN THE PETITION THEREFOR.

In Rule 38, subdivision 5, of the Rules of this Court, the character of reasons are stated which this Court will consider in granting a petition for writ of certiorari, they being three in number. Without reciting them, it is clear on the face of the petition that none of the three reasons stated by this Court appear in the petition or in the brief in support thereof. It is clear from the petition itself that there is no decision of a

State Court here involved, within the meaning of Rule 38, subdivision 5(a); that the Circuit Court of Appeals in this case has not rendered a decision in conflict with the decision of another Circuit Court of Appeals in the same matter, nor do petitioners claim that has been done; nor has it decided an important question of local law in a way probably in conflict with applicable local decisions; nor has it decided an important question of federal law which has not been but should be settled by this Court; nor has it so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower Court as to call for an exercise of this Court's power of supervision. On the contrary, we have shown that the cases of *Kelso v. Ulrich, supra,* and *Sawyer v. Sterling, supra,* fully support the rule of local law applied by the Circuit Court of Appeals. Lastly, there is no decision of the United States Circuit Court of Appeals for the District of Columbia here involved.

CONCLUSION.

It is undisputed that petitioners have had possession of the property involved in this case from March 24, 1937, the date of the execution of the conditional sales agreement, until the present time—eight years later—and that respondent during that period has received at most only $325 as payments on account of the principal, interest and taxes due under said contract, and that petitioners have never at any time tendered the moneys due under said contract, in spite of the service

of two written notices of default and demand for performance. It is therefore crystal clear that the Circuit Court of Appeals made the only decision possible under the undisputed facts, all of which appear in the transcript of record before this Court, and in accordance with the unbroken rules of law laid down in California, starting with *Glock v. Howard,* 123 Cal. 1, and ending with *Kelso v. Ulrich,* 67 A.C.A. 800 (decided on January 26, 1945). In fact it is very obvious that petitioners have resorted to the Courts in this matter for the sole purpose of getting additional free use of the premises, and to remove the crops grown thereon without paying for them. If petitioners were acting in good faith they should easily have been able to refinance their small loan in eight years. If not they should be compelled forthwith to surrender the land as they have been unable to meet the vendor's very lenient purchase terms in an unreasonably long time.

Dated, San Francisco, California,
April 11, 1945.

Respectfully submitted,
O. K. CUSHING,
EUSTACE CULLINAN,
DELGER TROWBRIDGE,
Attorneys for Respondent.

Due service and receipt of a copy of the within is hereby admitted

*this*_____*day of April, 1945.*

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Attorneys for Petitioners.